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IN THE

Supreme Court of the United States

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 770,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

Petitioner files herewith its reply to the brief for Respondent and the brief *amicus* for the American Federation of Labor and Congress of Industrial Organizations pursuant to the provisions of Rule 24 and Rule 40 of this Court.

I

The Norris-LaGuardia Act Is Entirely Inconsistent With the Objectives of Federal Labor Policy Under Section 301

The fundamental premise of the arguments made in the brief for *amicus,* American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO"), is that the Norris-LaGuardia Act is basically consistent with the federal law of labor arbitration (Br. 3; 14).

The argument is that a basic element of the federal law of labor arbitration under collective bargaining agreements requires the adjudication of disputes under such contracts by arbitrators and not the courts, and that this basic element, therefore, echoes the prohibitions against the use of injunctions enacted by Congress in the 1932 Act.

This underlying premise will not bear examination. A principal objective of the federal labor law is the substitution of arbitration for industrial strife. Implicit in the emphasis that has been placed upon the development of the arbitration process as a means of resolving grievances between employers and unions is the elimination of the strike in breach of a contract. If arbitration is to be a genuinely effective substitute for economic pressure and if industrial warfare is indeed to be done away with, then an effective and immediate remedy must be available against the labor organization that chooses not to honor its contractual commitment not to strike but instead to arbitrate in an effort to force the employer to bend to its will without regard to the contract. Thus, the Norris-LaGuardia Act is not at all consistent with this policy. If the Norris-LaGuardia Act is not accommodated with Section 301, the effectuation of the federal law of labor relations will be frustrated.

II

The Present Rule Under Sinclair Has Not Achieved Parity of Bargaining Power

Respondent and *amicus* assert that presently there is a parity of bargaining power or strength which would be disturbed should *Sinclair* be overturned. (See R. Br. 15-16; AFL-CIO Br. 17-18).

The argument is made that there is a balance or parity under present law because neither party may obtain judicial restraint against the other prior to arbitration. It is asserted that the balance would be tipped in favor of employers if injunctions against breaches of no-strike clauses could be obtained, because it is contended that unions could not seek similar restraint of employers to prevent action affecting the working conditions and rights of employees.

Upon analysis, the true thrust of this argument is simple: that, prior to the decision of an arbitrator, labor organizations under federal law should be free to violate covenants not to strike at any time they disagree with action taken by the employer. Thus, Respondent and *amicus* would take the position that the federal law of labor relations is best effectuated by a policy which would subject the employer to all of the economic pressure of a strike in breach of contract, regardless of the merits of the dispute and regardless of the amount of time necessary to permit completion of the arbitration process. It is difficult to see the parity or equality of such a rule. The acts of employers affecting working conditions of employees may be remedied in arbitration with complete justice to the employees involved. The remedies of reinstatement, back pay and the like are certainly adequate to restore and make whole affected employees. Also, the discre-

tion of the arbitrator in fashioning a remedy is very broad. On the other hand, a strike shutting down a business is of an entirely different order.

A strike in breach of contract effectively upsets the parity of power that is established by a labor agreement which requires submission of disputes to arbitration without resort to economic action. Thus, a true inequality exists under *Sinclair*.

The argument is also made that overturning *Sinclair* would permit employers to seek restraint against unions but would withhold the availability of similar restraints against acts of employers. The argument is not well taken. Accommodation of Norris-LaGuardia with Section 301 would obviously provide equal access to the judicial process by employers and labor organizations alike. Thus, a no-strike/arbitration agreement is invariably also a no-lockout/arbitration agreement. Section 301 makes both sides of the commitment to arbitrate rather than to use economic force equally enforceable by the courts. See *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962).

The essence of the unions' "parity" argument, and indeed of their whole position, is that the no-strike clause is just another provision of the contract, the breach of which can be dealt with, if at all, only by an arbitrator, at least in the first instance. The truth of the matter, however, is that the no-strike commitment is the other side of the agreement to arbitrate and is inseparable from it, and that a court's power under § 301 to enforce the agreement to arbitrate is rendered illusory by its inability under *Sinclair* to enforce the concomitant agreement not to strike. A court order to a union to arbitrate a grievance it has

pledged to arbitrate, rather than strike over, is wholly without substance if it does not reach the strike which is the very essence of the refusal to arbitrate.

III

The Power To Restrain Strikes in Breach of Contract Is Not Inappropriate, and Abuse of Such Power Is Not To Be Expected

The timeworn arguments against the use of equitable remedies by Federal Courts in the context of labor relations disputes are again advanced. (AFL-CIO Br. 18-22).

Little need be said in defense of the Federal Courts and their ability or competence properly to adjudicate the issues between an employer and a labor organization which has engaged in a strike in violation of its labor agreement. We submit that the record of the decisions of the courts since *Lincoln Mills* is eloquent testimony in contradiction to the contention that even as guided by this Court they cannot be trusted with equity powers in such matters.

As the present case shows, there is seldom any inherent complexity in the question whether a labor organization is engaging in a strike in breach of contract. Certainly, no more complexity is involved than in the correlative cases in which the court is required to determine whether a dispute is arbitrable under a labor agreement upon a suit to compel arbitration. Respondent and *amicus* do not urge that the Federal Courts are not competent to determine the issue of arbitrability in the context of a suit to compel arbitration, and thus, their fears that the courts would, however, be incapable of determining whether a strike is in breach of a contract to arbitrate and not to strike are unfounded.

Many collective bargaining contracts simply contain a flat prohibition against strikes during their term. Other contracts couple the no-strike pledge with matters subject to arbitration. Finally, a few permit the right to strike under certain given circumstances. The point is that determination of whether a labor organization is in violation of these provisions can most certainly not be deemed to be beyond the competence of a trial court, and, as we have said before, the courts must, in any arbitration dispute, determine whether the dispute is arbitrable under the agreement in question. Regardless of the possible complexity of the agreement before the court, the determination is often the same in both instances. Further, where the dispute is not within the scope of the arbitration clause or where there is no arbitration clause, § 301 clearly requires the Federal Courts to adjudicate the merits of a dispute arising under such a labor agreement.

It is implicit that in restraining a strike in violation of contract, a court would not be involved or engaged in the adjudication of the merits of the dispute which caused the strike. To the contrary, all that is involved is the enforcement of the union's promise not to strike so as to make meaningful the promise to arbitrate the underlying dispute.

IV

Agreements for "Quickie" Arbitration Procedures Are Not a Substitute for Judicial Remedies

The proposition is advanced that injunctive remedies are not really necessary because employers and unions can agree to so-called "quickie" arbitrations and then invoke the power of the courts to confirm the award of the arbitrator. (AFL-CIO Br. 27-32).

Far from being the practical compromise it is asserted to be, the "quickie" arbitration proposition is simply a concession by unions unwilling to acknowledge the implications of *Avco,* but faced with them nonetheless, that § 301 does indeed permit the Federal Courts to enjoin strikes in breach of contract.[1] A pre-arbitration injunction against a strike to undercut arbitration is no less, and is actually more, supportive of arbitration than a post-arbitration injunction against such a strike. Also, the assumption that "quickie" arbitration will necessarily put an arbitrator between the court and the strike is false, for there is nothing to justify the supposition that court intervention to compel compliance with a "quickie" arbitration clause will be needed any less than court intervention to compel compliance with any other arbitration clause. Furthermore, there is no reason to suppose that an arbitrator is better able than a court to clear the air, judge the issues, and enforce a ruling when a union or the employees are resisting arbitration or claiming the right to resist. Section 301 calls upon the court to do just those things. Indeed, a court, as an outside authority, is far better able to deal effectively with the assault on arbitration which a strike in breach of contract necessarily is, and to restore the situation so that arbitration can be effective,

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[1] This concession that injunctions against strikes in breach of contract are in fact necessary and desirable also devalues all assertions that damages and discipline effectively remedy strikes in breach of contract in the usual case. Such assertions, we respectfully submit, partake of disingenuousness or naiveté. They are of a piece with Respondent's argument (Br. 13) that the brevity of the strike in this case demonstrates that strikes in breach of contract are not a serious problem. The strike here lasted only one day *because it was enjoined.*

than is an arbitrator, who is dependent upon the good will and acceptance of both parties for his ability to function.

The "quickie" arbitration is no solution, and its possible use forms no basis upon which the determination of this Court may be made. Needless to say, whatever effectiveness in remedying breach of contract strikes the procedure might be said to have in theory, it has not been frequently found in labor agreements, and its use depends entirely upon the willingness of labor organizations to enter into such contracts. Without doubt, whatever superficial attraction the theory may have, it is valueless to employers dealing with labor organizations that will not consider the idea or who are bound to long-term contracts which make no such provisions. The question of the meaning of § 301 does not turn upon whether or not the contract provides for "quickie" arbitration. There is no justification in § 301 for unions to be permitted to insulate themselves from meaningful implementation of § 301's policy favoring arbitration by the imposition of the requirement that "quickie" arbitration be first negotiated, or for employers to be required to obtain such agreements before § 301 can be effectuated, even in part, for them.

Of equal importance is the fact that the word "quickie" is a practical misnomer and that "quickie" arbitrations are an illusion. The time required to choose and/or bring in the arbitrator and to convene the hearing (even accepting the dubious assumption that proponents of the strike will cooperate to implement these procedures promptly), and to make the record and render an award, is very likely to be prolonged. Any delay will very likely force the employer

to submit to the union's will and deprive him of his rights under the contract. The pressure will become greater when the union refuses to obey the arbitrator's award, thus requiring the employer to suffer for the additional time necessary to obtain enforcement by the Federal Court. To emphasize this point, the contract involved in the *New Orleans Steamship* case cited by *amicus* required submission to arbitration within 72 hours and an award within 12 hours. But, as the facts of the case show (AFL-CIO Br. 28), the hearing in that case commenced on October 8, 1965, and lasted for four days. The arbitrator's award was not handed down until December 13, 1965, over two months later. It can hardly be urged that such a "quickie" procedure realistically provides an effective remedy for an employer. Neither can it be successfully urged that such a procedure is a true substitute of the arbitration process for industrial warfare.

CONCLUSION

For the reasons stated herein and in the prior briefs for Petitioner, it is respectfully submitted that the judgment of the Court below should be reversed with instructions to affirm the order of the District Court granting injunction pending arbitration.

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